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No. 96-826

In The

Supreme Court of the United States

October Term, 1996

KATHERINE M., by next friend,

LESA T.,

Petitioner,

vs.

FLOUR BLUFF INDEPENDENT SCHOOL DISTRICT,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Whether the Court of Appeals was correct in determining that Flour Bluff Independent School District did not violate the statutory rights of Petitioner, a deaf student, by exercising the policy choice to place her in a nearby regular elementary school with state-supported centralized services for deaf students and where Petitioner actually received appropriate services from school staff specially trained and experienced to serve her needs, and where:

1. 20 U.S.C. 1414(d)(3) specifically authorizes the state to provide direct services and, as a corollary, the local school district has a right to access such services for a child;

2. the Court of Appeals rejected Petitioner's argument that *Daniel R. R. v. State Bd. of Educ.*, 874 F.2d 1036 (5th Cir. 1989) (a mainstreaming case) controls, and instead relied on applicable statutes, regulations, and appellate opinions directly addressing the placement issue in this case; and

3. there was no issue in this case about whether Petitioner received appropriate supplemental aids and services in a mainstream setting.

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

KATHERINE M., by next friend,

LESA T.

Petitioner,

vs.

FLOUR BLUFF
INDEPENDENT SCHOOL DISTRICT,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

TO THE UNITED STATES SUPREME COURT:

Respondent requests the Court to deny the petition for writ of certiorari. The Court of Appeals' decision is consistent with applicable statutes, regulations, and decisions of the

Circuits which have ruled on the issue upon which Petitioner challenged her special education program.

OPINIONS BELOW

The Petition correctly identifies the opinions below.

JURISDICTION

This Court has jurisdiction under 20 U.S.C.A. § 1415(e)(2) and 28 U.S.C.A. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved are listed below. The text is set out in the Appendix to this brief, except those which are set out in the Petition are not duplicated in this brief.

20 U.S.C.A. § 1401(a)(1)(A)(i)
20 U.S.C.A. § 1401(a)(16)(17)(18)(20)
20 U.S.C.A. § 1412(2)(B) and (5)(B)
20 U.S.C.A. § 1414(d)(3)
20 U.S.C.A. § 1415(b)(2) and (e)(2)
34 C.F.R. § 300.552
Tex. Educ. Code § 29.301, § 30.081
19 Tex. Admin. Code § 89.1050

STATEMENT OF THE CASE

A. Course of Proceedings and Disposition in the Court Below.

This is a special education case under the Individuals

with Disabilities Education Act ("IDEA"), 20 U.S.C.A. § 1400, et seq, involving the "least restrictive environment" provision of the IDEA, 20 U.S.C.A. § 1412(5)(B). The single issue involves whether a deaf student's individualized education program must be implemented at her home school or whether it may be implemented at a nearby regular school where services specifically to address the student's educational needs are provided to the student.

Petitioner Katherine M. ("Katie"), who qualifies for services under the IDEA due to deafness,[1] initiated this proceeding through her mother, Lesa T., by requesting an administrative due process hearing under 20 U.S.C § 1415(b)(2), asserting she was denied her right to a free appropriate public education[2], stating as her sole issue,

> "Katherine M.'s Least Restrictive Environment would be her home campus in the Flour Bluff I.S.D. She is not being allowed to attend her home school."

(R. Ex. 10 at 79.)[3] Petitioner sought transfer to Flour Bluff Elementary School or, alternatively, to a private or parochial school at the expense of Flour Bluff Independent School District ("school district" or "Respondent"). (R. Ex. 10 at 37-38)

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[1] See 20 U.S.C.A. § 1401(a)(1)(A)(i)

[2] 20 U.S.C.A. § 1401(a)(18)

[3] The notations "R." refers to the record (including Volume and/or exhibit reference) in the District Court. The record includes the record of the administrative proceeding filed in the District Court pursuant to 20 U.S.C.A. § 1415(e)(2). The notation "Pet." refers to the Petition, and the notation "App. to Pet." refers to the Appendix to the Petition.

The special education hearing officer ordered Petitioner to be transferred to Flour Bluff Elementary School. (App. to Pet. at 35a-67a) Katie had been placed at Calk Elementary School, where she had received services by specially trained personnel provided by the state-supported Regional Day School Program for the Deaf. Flour Bluff Elementary School had no staff specially trained to serve Petitioner's deafness-related educational needs.

The school district sought judicial review. See 20 U.S.C.A. § 1415(e)(2). The District Court adopted much of the special education hearing officer's opinion and ordered Petitioner to be transferred from Calk Elementary School to Flour Bluff Elementary School despite the lack of trained service providers and despite the substantial additional financial cost of duplicating (or attempting to duplicate) services theretofore provided to Katie at Calk Elementary School by the Regional Day School Program for the Deaf. (App. to Pet. at 19a-34a)

The school district appealed. The Fifth Circuit Court of Appeals reversed. *Flour Bluff Independent Sch. Dist. v. Katherine M.*, 91 F.3d 689 (5th Cir. 1996) (reproduced in App. to Pet. at 1a-16a)[4]

B. Statement of Facts

Petitioner Katherine M. ("Katie") is a bright, academically successful child who receives special education services due to bilateral severe to profound sensorineural

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[4] Footnotes 1 through 29 to the Court of Appeals' opinion are misnumbered in the Appendix to the Petition as footnotes 2 through 30. Also, footnote 1 to the District Court's order is misnumbered in the Appendix to the Petition as footnote 31. (See App. to Pet. at 28a.)

hearing loss. (R. PX-3; R. Ex. 11 at 192) Katie lives in the City of Corpus Christi, Texas. Her home school district is Flour Bluff Independent School District which lies within the geographical boundaries of the city of Corpus Christi, Texas. Flour Bluff Independent School District has no neighborhood schools, but a single complex in which all school buildings are located. (R. Vol. 3 at 3) The school complex is approximately nine miles from Katie's home. (App. to Pet. at 14a)

The State of Texas provides support for services to deaf students in various regions throughout the state through a program called the Regional Day School Program for the Deaf ("RDSPD"). See Tex. Educ. Code 30.081, et seq.[5] The RDSPD is not a separate school or facility, but a state-supported program administered on a regional basis to provide educational services (academic instructors, interpreters, speech-language pathologists, counselors, audiologists, educational diagnosticians, and equipment) for deaf students in Texas schools. The State of Texas contracts with Corpus Christi Independent School District to provide services for deaf students in a multi-county area of South Texas. Itinerant services (excluding the services of interpreters and speech-language pathologists) are provided on a limited basis to schools within the region. (R. Ex. 11 at 134 (269-70))

Beginning at 18 months of age, Katie received services from RDSPD personnel. Instructional and related services were provided at Calk Elementary School, a school with RDSPD service providers on staff. Calk Elementary is a regular elementary school within Corpus Christi Independent School District. Flour Bluff Independent School District adjoins the

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[5] The Texas Education Code was redrafted effective May 30, 1995. The applicable statute prior to May 30, 1995, was Tex. Educ. Code § 11.10.

boundaries of Corpus Christi Independent School District. Calk Elementary is 17 miles from Katie's home, and Flour Bluff Elementary is about nine miles from her home. (App. To Pet. at 14a) Of the approximately 500 students enrolled in Calk Elementary in the 1994-95 school year, 31 students were deaf.

In addition to services provided to Katie by interpreters, speech-language pathologists, and audiologists, Katie also received direct instruction at Calk Elementary School from an RDSPD teacher of the deaf until the fall of 1994 when Katie was in the third grade. At that time, at Katie's mother's request and with the concurrence of the Admission, Review and Dismissal Committee,[6] direct instruction from the teacher of the deaf was discontinued and Katie was changed from partial mainstreaming[7] to full mainstreaming. Direct related services (as distinguished from direct instruction) continued and, as to speech therapy, were increased from 90 to 150 minutes per week. These services included a full-time interpreter, therapy by two speech-language pathologists, and hearing assessment and equipment maintenance by an audiologist. (App. to Pet. at 5a-6a)

The first planning team (ARD Committee) meeting in which placement was disputed occurred in December 1994.

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[6] The multi-disciplinary program planning team is referred to in Texas as the "Admission, Review, and Dismissal Committee" or "ARD Committee." Tex. Educ. Code § 29.301. (Vernon 1996); 19 Tex. Admin. Code. § 89.221 (amended and renumbered as 19 Tex. Admin. Code § 89.1050 effective September 1, 1996).

[7] The term "mainstream" is not used in IDEA, but is a shorthand description of the requirement in 20 U.S.C.A. § 1412(5) to educate disabled children, to the maximum extent appropriate, with children who are not disabled. See *Honig v. Doe*, 484 U.S. 305, 311, 108 S.Ct. 592, 597 (1988); *Daniel R.R. v. State Bd. Of Educ.*, 874 F.2d 1036, 1039 (5th Cir. 1989).

Katie's mother requested the committee to transfer Katie from Calk Elementary School to Flour Bluff Elementary School. The Committee declined to do so, citing the comprehensiveness of the RDSPD services at Calk Elementary School; the opportunities at Calk Elementary for Katie to have relationships with both hearing and non-hearing peers; the opportunities at Calk to use different interpreters; and the lack of an educational benefit at Flour Bluff Elementary superior to the benefits from the RDSPD at Calk Elementary. (App. to App. at 6a-7a)

The ARD Committee's decision to continue placement of Katie at Calk Elementary School (17 miles from Katie's home) rather than Flour Bluff Elementary School (9 miles from Katie's home) led to the administrative and judicial proceedings under 20 U.S.C.A. § 1415(b)(2) and § 1415(e)(2). Katie alleged that placement at Calk Elementary School violated her right under the Individuals with Disabilities Education Act to a free appropriate public education because, she alleged, her placement was not the least restrictive environment. See 20 U.S.C.A. § 1412(5)(B).

Every witness with expertise and experience in teaching deaf children agreed that Katie's needs have been appropriately met at Calk Elementary School, that her needs will continue to be much better met in a school in which the RDSPD specialists can assist her, and that Katie should not be isolated as would be the situation at a Flour Bluff school. There was unanimous agreement among such experts that Calk Elementary School was a more appropriate placement than Flour Bluff Elementary School.

It is undisputed that Katie was on the academic honor roll at Calk Elementary School. Her success demonstrates that her educational needs were being met. See *Board of Educ., Etc.*

v. Rowley, 458 U.S. 176, 209-10, 102 S.Ct. 3034, 3052 (1982). As to classroom performance, Katie's teacher testified to her belief that Katie could be successful in any classroom with an interpreter, special seating, and assistance in note-taking.[8] However, there is no dispute about the in-classroom services provided to Katie or about whether Katie has the ability to succeed in different classrooms or schools.

The school district has never suggested that Katie will likely fail if the district were prohibited from placing her at a school where RDSPD specialists have provided services to Katie. Rather, it is the school district's position that Katie's ability to continue to excel is greatly enhanced if she continues to receive the best locally available services, and her opportunity is diminished if the school district is not permitted to place Katie at a school where the best locally available service providers (i.e., the RDSPD specialists) are located.

Access to highly trained specialists is especially critical at this stage of Katie's education. It is undisputed that the need to master more advanced language skills increases in each grade as the subject matter of academic classes becomes more abstract and more complex.

It is undisputed that certified interpreters and speech-language pathologists with special training for serving deaf students are very scarce in the Corpus Christi area. It is

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[8] The regular education third grade teacher in whose class Katie was mainstreamed had no special training or experience teaching deaf students. (App. to Pet. at 25a) She was not asked for and did not offer an opinion about the type or quality of special services provided to Katie at Calk Elementary School (interpreter, two speech-language pathologists, and audiologist) or about the type, quality or availability of service providers at Flour Bluff Elementary School, or about the relative benefits of placement in either school.

undisputed that speech-language pathologists comparable to those who provided speech and language therapy to Katie at Calk Elementary School are not available to Flour Bluff Independent School District due to scarcity of qualified personnel. (App. to Pet. at 12a-13a) It is undisputed that providing minimally adequate services to Katie on a Flour Bluff campus costs several times as much as providing superior services through RDSPD personnel at Calk Elementary School. (App. to Pet. at 27a-28a; R. Vol. 3 at 4-6)

C. Misstatements of Fact and Law in the Petition

There are so many misstatements of fact and law in the Petition that Respondent has collected them in the Appendix to this reply brief. Some of the particularly egregious misstatements are also addressed in Respondent's argument.

SUMMARY OF REASONS TO DENY THE WRIT

The writ should be denied. The bases upon which Petitioner requests the writ are misleading and are misstatements about the facts, about the law, and about the opinion of the Court of Appeals.

Petitioner asserts this Court should grant a writ because: (1) she interprets the opinion of the Court of Appeals to conflict with *Board of Educ., Etc. v. Rowley*, 458 U.S. 176, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982) (Pet. at 7-12); (2) she interprets the opinion of the Court of Appeals to conflict with *W.G. v. Bd. of Trustees of Target Range School D.*, 960 F.2d 1479 (9th Cir. 1992) (Pet. at 12); and (3) she asserts generally that the Court of Appeals misunderstands and/or misinterpreted the IDEA and

its importance (Pet. at 7-11), and the Court of Appeals' opinion lacks a rationale or legal basis (Pet. at 14). All of these assertions are wrong.

There is no conflict between the opinion of the Court of Appeals and *Rowley*. There is no conflict between the opinion of the Court of Appeals and *W.G.* Not only is the opinion of the Court of Appeals not in conflict with any cases cited by Petitioner, it is aligned with the opinions of Circuits which have addressed the same type of placement decision at issue in this case. Petitioner omitted any reference to precedential opinions cited by the Court of Appeals. Petitioner's assertions are contrary to the facts, contrary to the law, and contrary to the opinion of the Court of Appeals.

There is no reason to grant a writ in this case. The Court of Appeals has rendered a clear, well-reasoned opinion construing applicable statutes and regulations in a way that implements the purpose of the Individuals with Disabilities Education Act, that recognizes the policy choices and methodology decisions reserved for educators, that allows the school district to meet Katie's individual needs by choosing higher quality services at less cost, and that aligns the Fifth Circuit with other circuits which have construed the "least restrictive environment" issue in a similar context.

ARGUMENT TO DENY THE WRIT

Unlike her statement of issues in her Question Presented, in her argument, Katie states the issue before this Court as:

> "Are general convenience considerations of administrators to be given priority over the disabled child with his/her unique, individualized

needs?"

(Pet. at 10) General convenience of administrators has never been an issue in this case, and certainly was not the basis for any holding by the Court of Appeals.

Katie also identifies 20 U.S.C. § 1401(a)(20) as "a pivotal section in this case." (Pet. at 14) Section 1401(a)(20) defines the subject matters to be included in a child's individualized education program ("IEP"). However, Katie has not challenged the content of her IEP. She challenged only the location where the program is to be implemented.

The overall theme of the Petition is the false premise that Katie has one or more unspecified unaddressed educational needs related to her hearing disability, that this need or these needs were not being met at Calk Elementary School, that the Court of Appeals considered the failure to meet these unidentified educational needs as acceptable because it was administratively inconvenient to meet Katie's needs, and the Court of Appeals' opinion creates a conflict among the courts. Every component of this theme is contrary to the evidence and contrary to the opinion of the Court of Appeals.

1. Petitioner's assertion that her educational needs were subordinated to administrative convenience is untrue.

Although the source of the "administrative convenience" argument is unclear in the Petition, this argument possibly may be related to (but based on a misinterpretation of) the discretion of school officials to make policy choices and decisions about educational methodology. The discretion concerning policy and methodology is not to be confused with procedurally

"administratively convenient" decisions such as, e.g., skipping procedural steps in formulating a child's education program, or failing to provide proper notifications to parents.

Whether a service is needed and how a service should be provided involve substantive educational issues. As to substantive policy choices and methodology, this Court has stated:

> The primary responsibility for formulating the education to be accorded a handicapped child, and for choosing the educational methods most suitable to the child's needs, was left by the Act to state and local educational agencies in cooperation with the parents or guardian of the child.
>
> * * *
>
> We previously have cautioned that courts lack the "specialized knowledge and experience" necessary to resolve "persistent and difficult questions of educational policy." (Citation omitted) We think that Congress shared that view when it passed the Act. As already demonstrated, Congress' intention was not that the Act displace the primacy of States in the field of education, but that States receive funds to assist them in extending their educational systems to the handicapped.

Board of Educ., Etc. v. Rowley, 458 U.S. 176, 207-208, 102, S.Ct. 3034, 3051-52 (1982). The Court of Appeals expressed its appropriate role as:

> Congress left the choice of educational policies and methods where it properly belongs--in the hands of state and local school officials. Our task is not to second guess the state and local policy decisions; rather, it is the narrow one of determining whether state and local school officials have complied with the Act.

Flour Bluff Independent Sch. Dist. v. Katherine M., 91 F.3d 689, 693 (5th Cir. 1996), quoting *Daniel R. R. v. State Bd. Of Educ.*, 874 F.2d 1036, 1048 (5th Cir. 1989). (See App. to Pet. at 8a). Determinations about how to access and allocate scarce personnel resources and financial resources in order to provide needed services are issues of policy. The decision about whether to provide the specialized services Katie needs by placing Katie at a school with on-staff specialists or whether to duplicate on its campus those specific services which Katie needs is a policy issue. (App. to Pet. at 14a-15a) See also *Barnett v. Fairfax County School Bd.*, 927 F.2d 146, 152 (4th Cir. 1991), cert denied 502 U.S. 859, 112 S.Ct. 175 (1991). This important policy determination must not be trivialized and should not be misdescribed as "administrative convenience."

2. Placing Katie at a nearby regular school where the specific services required by her individualized education plan were provided to her at higher quality and less cost was a proper policy decision and did not violate the IDEA.

The State of Texas is authorized to make the policy decision to provide direct services to deaf students at centralized locations. 20 U.S.C.A. § 1414(d)(3). The local school district is authorized to make the policy decision to provide the specific services needed to address Katie's educational needs by either:

(a) placing Katie at the nearby school where state-supported specialists are available to deliver the IEP-required services to Katie at a low cost; or (b) placing Katie at her home school and hiring or contracting the personnel (to the extent at least minimally qualified personnel are available) to deliver the same IEP-required services.

Under either choice, Katie's individual educational needs are a function of the degree and severity of her disability, and the services required to address such needs are determined by Katie's ARD Committee. Upon determining the type and amount of services needed, the next question is the instructional setting (mainstream, segregated, or a combination of both) and location(s) where the services are to be provided. The Court of Appeals emphasized the separateness of the decision about the services to be provided and the decision about placement under the least restrictive environment analysis. (App. to Pet. at 9a) The ARD Committee's decision as to the location for delivery of services to Katie is the only issue on which this entire proceeding is based. Neither the content of her educational program nor the instructional setting is challenged.

Katie needs several (although not all) of the services provided by the state-supported specialists at the centralized school. Therefore, the ARD Committee may choose to provide for these services (interpreter, speech-language pathologists, and audiologist) by placing Katie at a nearby school where the specialists are located, or may provide for the services by placing Katie on her home campus if campus-based service providers are available and adequate. This choice involves an educational resource determination (availability and quality of service-providers) and a financial resource determination (relative cost of utilizing the state-supported specialists compared to direct hiring). Both resource determinations are

important policy considerations. (App. to Pet. at 14a-15a) Respondent did not violate Katie's rights by placing Katie at a school where she could receive better services at lower cost rather than placing Katie at her home school with less adequate services at greater cost.

The Petition confuses the concept of a student's educational needs that are to be addressed by special instructional and/or related services [9] with the concept of the instructional setting in which the services are delivered (i.e., the least restrictive appropriate environment)[10] and with the concept of transitional services[11] in preparation for the time when a student may need continued support from social agencies but has "aged out" of eligibility for special education services at age 21.[12] Katie's attempt to bootstrap the idea of preparation for post-school activities in her adult life when she will no longer be eligible for a school-provided interpreter, speech-language pathologist, or audiologist (See Pet. at 13) into a "need" not to continue access to these services now is preposterous. It is equally preposterous to suggest Katie has an educational "need" not to continue to receive such services in a nearby school where the trained specialists delivered services to Katie in accord with her IEP. It is illogical and educationally unsound to reduce the quality, quantity, or type of educationally-needed services for Katie so that Katie can learn to "sink or swim" in

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[9] See 20 U.S.C.A. § 1401(a)(16) and 1401(a)(17).

[10] 20 U.S.C.A. § 1412(5)(B).

[11] 20 U.S.C.A. § 1401(20)(D).

[12] 20 U.S.C.A. § 1412(2)(B).

anticipation that, as an adult, she will likely encounter little or no accommodations for her disability. It is also undisputed that Katie already has the ability to function in "real world" settings. (App. to Pet. at 22a-23a).

Nowhere in the Petition does Katie assert that a different or additional service was needed to address her disability-related educational needs. Nowhere does she assert that a service actually provided was inadequate or inappropriate. Nowhere does she assert the services provided (interpreter, speech therapy, and audiological services) were unneeded or somehow were not designed to meet her specific educational needs related to her deafness. Nowhere does she assert these same services would not be needed at Flour Bluff Elementary or any other school she may attend throughout her years in school. This case simply has nothing to do with unmet educational needs.

Katie asserts that her needs were not considered because she requires only some, but not all, of the types of services available to deaf students at Calk Elementary School. Katie theorizes that, because she does not receive direct instruction (as distinguished from services) or need all of the special services available from RDSPD specialists and because it is likely she has the ability to succeed academically at her home school, she is entitled to attend her home school and therefore Flour Bluff school district is required to provide on its campus whatever services Katie needs. This reasoning leads to the untenable result that a bright, successful student who needs deafness-related services but does not need direct instruction from a teacher of the deaf (i.e., the student is capable of mainstreaming) must be transferred from a regional school where highly qualified interpreters, specially trained speech-language pathologists, and other service providers are located and moved to the student's home school where such highly

qualified service providers are not available.

The dispute in this case turns on the school district's authority to choose a high-quality cost-effective method of providing specialized support services to meet Katie's language and communication needs caused by her deafness. That is, does federal law allow the school district to place Katie at a nearby school where state-provided specialists are available and have provided appropriate direct services to Katie in accord with the services specified in her individual education plan? The answer is "yes." Or does federal law prohibit the school district from accessing these special service providers and require the school district, instead, to attempt to duplicate on its own campus the services Katie needs despite the scarcity of trained specialists and despite the far greater cost? The answer is "no."

This case is about the location where special education services are to be provided to Katie. "The act and regulations promulgated thereunder give the school district discretion in selecting the location where it will educate a handicapped child." *Schuldt v. Mankato School Dist. 77*, 937 F.2d 1357, 1361 (8th Cir.), cert. denied, 502 U.S. 1059, 112 S.Ct. 937 (1992). The dispute does not concern the content of Katie's educational program because there is no dispute about the content. This case does not concern Katie's opportunity to be educated in an instructional setting which includes non-disabled students because she was mainstreamed with non-disabled students in a regular (not special) school. The only issue is whether the school district may provide services to meet Katie's needs by placing her at a nearby school which has specially-trained service providers on staff, or whether the services must be duplicated (or attempted to be duplicated) on Katie's home campus. The Court of Appeals correctly decided that Katie's rights were not violated by her placement at Calk Elementary

School where she received services required by her IEP.

3. Petitioner's accusations that the Fifth Circuit misinterpreted the IDEA and misapplied Supreme Court directives are misleading and wrong.

Petitioner's assertion that the opinion in *Daniel R.R. v. State Bd. of Educ.*, 874 F.2d 1036 (5th Cir. 1989)

> "illustrates the stalemate in the Fifth Circuit's reasoning . . . and their inability to grasp the importance of the clear purpose of the Act, and this Court's elucidation of same in *Rowley*"

(Pet. App. at 8), and her assertion that the Fifth Circuit "does not consider the IDEA of much importance," (Pet. at 9) are outrageous misstatements.

Petitioner's criticism of the *Daniel R. R.* opinion is not only a serious misdescription of the opinion, but is an unexplained change of position. Petitioner relied on *Daniel R. R.* at every prior stage of this case and argued to the District Court and to the Court of Appeals that the school district violated Katie's rights by failing to follow the *Daniel R. R.* procedures.

Daniel R. R. is the leading case in the Fifth Circuit on procedures for determining the appropriateness of removing a disabled child from the mainstream and providing instruction in

a segregated environment.[13] As part of the mainstreaming analysis, the Court of Appeals emphasized the difference between policy and methodology questions involving the instructional content of a child's educational program (for which educators have great discretion in substantive educational matters) and procedural issues regarding the instructional setting in which a child's substantive educational program is implemented (for which Congress expressed a preference for mainstreaming). 874 F.2d at 1044.

The Court of Appeals made it clear that it rejected Petitioner's reliance on *Daniel R. R.* and emphasized that this is not a mainstreaming case. (App. to Pet. at 9a) Nevertheless, even though the Court of Appeals explained that *Daniel R. R.* and the other mainstreaming cases on which Petitioner relied are not controlling, Petitioner misrepresents to this Court that "the only case law upon which the opinion is based is *Daniel R. R.*" (Pet. at i ¶ 2) and "The only case mentioned by the Fifth Circuit panel in the body of its opinion is *Daniel R. R. . . .*" (Pet. at 8) In fact, the Court of Appeals properly distinguished *Daniel R. R.*, and properly relied on statutes, regulations, and relevant case law. The references in the Court's 29 footnotes (except for notes 11, 26, and 27) all refer to legal authorities. (See App. to Pet. at 2a - 15a and also see footnote 4 to this brief regarding

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[13] The Fifth Circuit declined to follow the Sixth Circuit's analysis regarding mainstreaming questions, and decided that the test in *Roncker v. Walter*, 700 F.2d 1058, 1063 (6th Cir.), cert. denied, 464 U.S. 864, 104 S.Ct. 196, 78 L. Ed.2d 171 (1983), "necessitates too intrusive an inquiry into the educational policy choices that Congress deliberately left to state and local school officials." *Daniel R. R.*, 874 F.2d at 1046. Petitioner's argument that the failure of the Fifth Circuit to take action en banc when the panel declined to follow the *Roncker* test somehow establishes that the Fifth Circuit "does not consider the IDEA of much importance" (see Pet. at p. 9) is illogical, improper, and inexplicable.

the misnumbering of these footnotes in the Appendix to the Petition.)

Petitioner asserts the Court of Appeals "erred in not finding that Respondent failed to consider that Katie could benefit from a placement at her neighborhood school with the use of supplementary aids and services." (Pet. at i, ¶ 3) This assertion appears in the Question Presented, but it is not argued. Placement issues in connection with provision of supplemental aids and services are based on 20 U.S.C.A. § 1412(5)(B). Analyzing whether a student can benefit from placement in a regular classroom with supplemental aids and services is a mainstreaming issue. See *Daniel R. R. v. State Bd. Of Educ.*, 874 F.2d 1036 (5th Cir. 1989). There is no mainstreaming issue in this case.

Furthermore, in a context as here, where the issue is placement at a school other than the student's home school in order to access quality services, the question is not whether the school district could duplicate on its campus sufficient services for the student to receive educational benefit. The issue is the discretion of the school district to choose to serve the student's educational needs on a campus where quality services already exist. The lack of merit to Petitioner's assertion is demonstrated by the Tenth Circuit:

> "[T]he LRE mandate does not include a presumption of neighborhood schooling, and a school district is not obligated to fully explore supplementary aids and services before removing a child from a neighborhood school. It is only so obligated before removing a child from a regular classroom with nondisabled children."

Murray v. Montrose County School Dist., 51 F.3d 921, 929, 930 (10th Cir.), cert. denied, ___ U.S. ___, 116 S.Ct. 278 (1995).

The Court of Appeals properly analyzed and construed the IDEA in the context of the placement decision to educate Katie in a school other than her home school. The Court's exhaustive analysis of the statutory and regulatory scheme for placement decisions explains that the educational planning team first incorporates into the student's individual education plan a description of the types of services needed to address the student's specific educational needs, and then a separate decision is made about placement in the least restrictive appropriate environment for delivery of the services. (App. to Pet. at 9a-10a) The Court of Appeals also properly delineated the scope of judicial authority with respect to intruding on school authorities' educational policy choices and methods. (App. to Pet. at 8a) See also *Board of Educ., Etc. v. Rowley*, 458 U.S. 176, 207-208, 102 S.Ct.3034, 3051-52) (issues of educational policy and methodology are left for the states).

Petitioner's reliance on *Rowley, supra*, on *Burlington School Committee v. Dept. of Educ.*, 471 U.S. 359, 105 S.Ct. 1996 (1985), and on *W.G. v. Bd. of Trustees of Target Range School D.*, 960 F.2d 1479 (9th Cir. 1992) with respect to the need for a student's IEP to address the student's individual educational needs (Pet. at 8-12) simply reiterates the undisputed principle that the services described in a student's individual education plan are to address the student's individual needs. There is no dispute in this case about whether the services described in Katie's IEP (i.e. services by interpreter, speech-language pathologists, audiologist) are designed to address her specific needs related to her deafness. As correctly explained by the Court of Appeals, the decisions about what services are

required and about the place where the required services are to be delivered are two separate inquiries. (App. to Pet. at 9a)

The Court of Appeals noted that the regulations, not the statute, provide that a child placed outside of her home school should be educated as close to home as possible unless the child's IEP requires some other arrangement and, in selecting the placement, consideration should be given to any potential harmful effect on the child or on the quality of services needed by the child. (App. to Pet. at 4a, quoting 34 C.F.R. § 300.552) The school district has options to provide the services itself or to provide the services by contracting with another service provider (App. to Pet. at 10a and note 22 (misnumbered as note 23 on page 10a), quoting 32 (sic 34) C.F.R. Pt. 300, App. C, Question 46)) The Court of Appeals did not misinterpret or misapply the IDEA.

4. The school district properly placed Katie in a program specifically authorized by 20 U.S.C.A. § 1414(d)(3).

States have the option of providing direct services to "children with disabilities who can best be served by a regional or State center designed to meet the needs of such children." 20 U.S.C.A. § 1414(d)(3). The Court of Appeals correctly determined that the "decision to create the regional day schools is a sound policy decision that was intended to be left to the state," (App. to Pet. at 13a), and "Flour Bluff School District was free to utilize the regional day school for its disabled students." (App. to Pet. at 14a)

Petitioner argues that 20 U.S.C.A. § 1414(d)(3) does not allow placing her in the school in which the Regional Day School Program for the Deaf provides direct services because,

she asserts, the Court of Appeals ignored the provision in the statute which states, "except that the manner in which such education and services are provided shall be consistent with the requirements of this subchapter." (Pet. at i, ¶ 1, and at 9-10) The subchapter to which Section 1414(d)(3) refers is Subchapter II of the IDEA, consisting of sections 1411 through 1420. Petitioner's argument is irrelevant and meritless.

There is no issue in this case about whether the State of Texas has complied with the IDEA in a manner to allow it to receive federal grants for its support to local education agencies or for its provision of direct special education services through state or regional programs. Furthermore, Petitioner does not argue that the manner in which the RDSPD service providers performed their services was not designed to meet her individual need for assistance in receiving information in the classroom (interpreter), or her individual needs for improving her speaking and language skills (speech-language pathologist) or her individual needs for audiological assessment and equipment maintenance (audiologist).

In connection with her argument about Section 1414(d)(3), Petitioner reargues her insupportable claim that general administrative convenience was given priority over her needs, and "that she does not need these specialized instructional services." (Pet. at 10, emphasis added) The "instructional services" which Petitioner says she does not need apparently means the service by a teacher of the deaf, and does not refer to the related services she received. This is so because Petitioner bases this statement on assessment data[14] and the

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[14] The most recent assessment data available after the administrative hearing but before the time of trial (May 1995 data available at the July 1995 trial) shows that Katie has significant language deficits and there is a continued

opinion of her regular classroom teacher in whose class she was fully mainstreamed. (Pet. at 10) The statement that Katie "does not need these specialized instructional services" clearly does not apply to the related services because she agrees that she "needs an interpreter, an (sic) speech therapist, and occasional access to an audiologist. Tr. Vol. III, p. 60, 1, 3-4)." (Katie's Brief in Court of Appeals at 4, citing testimony of Katie's expert)

5. The Fifth Circuit properly construed the law regarding placement outside a student's home school. It is not in conflict with other circuits which have ruled on this issue.

In arguing that the Court's opinion is in conflict with *Rowley*, 458 U.S. 176, 102 S.C. 3034 (1982), and with *W.G. v. Bd. of Trustees of Target Range School D.*, 960 F.2d 1479 (9th Cir. 1992), Petitioner is not only incorrect about the existence of a conflict, she also omitted any reference to directly relevant case law. Several Circuits have interpreted the statutory and regulatory scheme in the context of placing a child outside his home school in order to provide the student with services available on a different campus.

An especially analogous case addressing the discretion of a school district to utilize centralized services at a school other than a student's home school is *Barnett v. Fairfax County School Bd.*, 927 F.2d 146 (4th Cir.), cert. denied 502 U.S. 859, 112 S.Ct. 175 (1991). In *Barnett*, a high achieving deaf student was mainstreamed in a regular public school with centralized services for deaf students located five miles farther from home

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need for expert assistance for Katie to improve her language skills. (R. Ex. 1-7)

than his base school. In this fact setting nearly identical to Katie's placement at Calk Elementary School, the court stated:

> We also reject plaintiffs' suggestion that the [IDEA] requires the Board to duplicate at Michael's base school a highly specialized education program because Michael's base school is a few miles closer to his home. Adopting plaintiffs' position would require us to intrude upon the educational policy choices that Congress deliberately left to state and local school officials. Whether a particular service or method can feasibly be provided in a specific special education setting is an administrative determination that state and local school officials are far better qualified and situated than are we to make.

Id. at 152.

The Tenth Circuit considered whether a school district properly placed a student at a school ten miles from his home school in order to access a program at the more distant school, and whether 20 U.S.C.A. § 1412(5)(B) includes a presumption that the least restrictive environment is in the neighborhood school with supplementary aids and services. The Court held the least restrictive environment provision includes a preference, but not a presumption, for neighborhood schooling; i.e., a child should be educated in his neighborhood school unless his IEP requires placement elsewhere, in which case the geographically closest appropriate facility should be selected. *Murray v. Montrose County School Dist.*, 51 F.3d 921, 929, 930 (10th

Cir.), cert. denied, ___ U.S. ___, 116 S.Ct. 278 (1995).[15] The Court of Appeals agreed with the Tenth Circuit and "emphasized that the proximity preference or factor is not a presumption that a disabled student attend his or her neighborhood school." (App. to Pet. at 11a)

Recently, the Tenth Circuit decided *Urban v. Jefferson County School Dist. R-1*, 89 F.3d 720 (10th Cir. 1996), a case in which a disabled child argued, among other issues, that he should be placed in his home school rather than a different school where programs specific to his needs were in existence. The Court stated:

> Gregory . . . bases his appeal solely on the ground that he was denied transition services in a specific location--his neighborhood school in Evergreen. As we held in *Murray*, the IDEA does not give him a right to a placement at a neighborhood school . . . The IDEA only entitles Gregory to an appropriate education, and the state "satisfies this requirement by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction." *Rowley*, 458 U.S. at 203, 102 S.Ct. at 3049. Gregory received and benefitted from such personalized

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[15] To the extent the Third Circuit considers the IDEA to encompass a presumption, rather than a preference, for neighborhood schooling, the Tenth Circuit disagrees. See *Murray*, 51 F. 3d at 929 referring to *Oberti v. Board of Educ.*, 995 F. 2d 1204 (3rd Cir. 1993). The Court in *Murray* noted that the *Oberti* court appeared to qualify the presumption and, in any event, *Oberti* was an inclusion case where removal from a neighborhood school as part of removal from a mainstream classroom was a secondary issue. 51 F.3d at 929, n. 13.

> instruction. The IDEA does not entitle him to more.

Id. at 727. See also *Poolaw v. Bishop*, 67 F.3d 830 (9th Cir. 1995) (placement of deaf student in a residential school 280 miles from home complied with IDEA); *Wilson v. Marana Unified Sch. Dist. Of Pima County*, 735 F.2d 1178 (9th Cir. 1984)(placement of physically handicapped child at school in a nearby district to obtain better services was proper, even though the parents preferred the neighborhood school with lesser services); *Schuldt v. Mankato Sch. Dist.*, 937 F.2d 1357 (8th Cir. 1991), cert denied 502 U.S. 1059, 112 S.Ct. 937 (1992) (placement of physically handicapped child in a fully accessible school four miles farther from neighborhood school was proper); *Lachman v. Illinois St. Bd. of Educ.*, 852 F.2d 290 (7th Cir.), cert. denied, 488 U.S. 925, 109 S.Ct. 308 (1988) (placement of deaf student in a regional program integrated into a regular school was proper).

Petitioner cannot argue genuinely that a conflict exists. The Fifth Circuit's joining the Fourth, Seventh, Eighth, Ninth, and Tenth Circuits in construing the discretion of educators to provide for delivery of appropriate services to a disabled student at a school other than the student's home school conforms with the body of established law.

6. The Court of Appeals did not err in its standard of review.

Petitioner asserts the Court of Appeals failed to give due weight to the decision of the state special education hearing officer, and therefore substituted its own notions of sound educational policy for those of the school authorities being reviewed. (Pet. at 13)

With respect to the references to sound educational policy, it was the hearing officer and district court, not the Court of Appeals, who substituted their own notions for that of school authorities and misinterpreted the law as well as their roles in doing so. Furthermore, Petitioner incorrectly refers to the hearing officer as a "school authority." (Pet. at 14) In Texas, special education hearing officers are private attorneys who contract with the state to conduct the administrative due process proceedings. (R. Ex. 9) They are not employed as educators by the state or by local school districts. The only decisions by school authorities in this case are the decisions made by the state education agency in administering the Regional Day School Program for the Deaf, and by the local school district in creating Katie's IEP and deciding where the IEP should be implemented.

In *Christopher M. v. Corpus Christi Indep. Sch. Dist.*, 933 F. 2d 1285, 1289 (5th Cir. 1991), the Fifth Circuit joined the Sixth, Seventh, and Ninth Circuits in deciding that the decision whether the IEP fulfills the IDEA is a mixed question of fact and law subject to *de novo* review. It is obvious the Court of Appeals applied a proper standard of review and corrected the district court's errors of law.

CONCLUSION

In reversing the district court judgment, the Court of Appeals correctly determined that the district court erred in relying on the hearing officer's conclusion about statutory interpretation, erred in presuming Katie's proper placement was her neighborhood school even though Katie required arrangements not in existence at Flour Bluff, erred in giving no weight to testimony about scarcity of educational resources, and erred in failing to consider the school district's policy consideration in sending Katie to the school with the regional

day school program. (App. to Pet. at 14a-15a)

The Court of Appeals' opinion is well-reasoned, based on established law, and clearly correct. The writ should be denied.

Respectfully submitted,

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APPENDIX

20 U.S.C. Chapter 33

20 U.S.C.A. § 1401 Definitions

(a) As used in this chapter--

(1)(A) The term "children with disabilities" means children--

(i) with mental retardation, hearing impairments including deafness, speech or language impairments, visual impairments including blindness, serious emotional disturbance, orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities;

(16) The term "special education" means specially designed instruction, at no cost to parents or guardians, to meet the unique needs of a child with a disability, including--

(A) instruction conducted in the classroom, in the home, in hospitals and institutions, and in other settings; and

(B) instruction in physical education.

(17) The term "related services" means transportation, and such developmental, corrective, and other supportive services (including speech pathology and audiology, psychological services, physical and occupational therapy, recreation, including therapeutic recreation, social work services, counseling services, including rehabilitation counseling, and medical services, except that such medical services shall be for diagnostic and evaluation purposes only) as may be required to assist a child with a disability to benefit from special education, and includes the early identification and assessment of disabling conditions in children.

(18) The term "free appropriate public education" means special education and related services that--

(A) have been provided at public expense, under public supervision and direction, and without charge,

(B) meet the standards of the State educational agency,

(C) include an appropriate preschool, elementary, or secondary school education in the State involved, and

(D) are provided in conformity with the individualized education program required under Sec. 1414(a)(5) of this title.

20 U.S.C.A. § 1414 Application

(d) Special education and related services provided directly by State educational agencies; regional or State centers

Whenever a State educational agency determines that a local educational agency--

(1) is unable or unwilling to establish and maintain programs of free appropriate public education which meet the requirements established in subsection (a) of this section;

(2) is unable or unwilling to be consolidated with other local educational agencies in order to establish and maintain such programs; or

(3) has one or more children with disabilities who can best be served by a regional or State center designed to meet the needs of such children; the State educational agency shall use the payments which would have been available to such local educational agency to provide special education and related services directly to children with disabilities residing in the area served by such local educational agency. The State educational agency may provide such education and services in such manner, and at such locations (including regional or State centers), as it considers appropriate, except that the manner in which such education and services are provided shall be consistent with the requirements of this subchapter.

TEXAS EDUCATION CODE

SUBCHAPTER I. PROGRAMS FOR STUDENTS WHO ARE DEAF OR HARD OF HEARING

Tex. Educ. Code § 29.301. Definitions

In this subchapter:

(1) "Admission, review, and dismissal committee" means the committee required by State Board of Education rules to develop the individualized education program required by the Individuals with Disabilities Education Act (20 U.S.C. Section 1400 et seq.) for any student needing special education.

Tex. Educ. Code § 30.081. Legislative Intent Concerning Regional Day Schools for the Deaf

The legislature, by this subchapter, intends to continue a process of providing on a statewide basis a suitable education to deaf or hard of hearing students who are under 21 years of age and assuring that those students have the opportunity to become independent citizens.

TEXAS ADMINISTRATIVE CODE

Tex. Admin. Code Chapter 89. Adaptations for Special Populations

§89.1050. The Admission, Review, and Dismissal (ARD) Committee.

(b) Each school district shall establish at least one ARD committee that shall make decisions concerning eligibility determinations, development of the IEP, consideration of assistive technology, development of the behavior management plans, and placement of a student referred for consideration for special education services in accordance with 34 Code of Federal Regulations (CFR), §§300.308. 300.342-300.349, 300.533 and 300.550-300.554, and Part 300, Appendix C; state statute; State Board of Education (SBOE) rules; and this subchapter.

Source: The provision of this §89.1050 adopted to be effective September 1, 1996, 21 TexReg 7236.

LIST OF MISSTATEMENTS OF FACT AND LAW IN THE PETITION

1. Assertion: "Katie wanted to transfer to Flour Bluff Elementary since she is capable of functioning in a world that does not make accommodations for her disability (App. 22a, 27a), and she could attend school with her neighborhood friends." (Pet. at 5)

Correction: There is no evidence that Katie's desire to transfer is based upon her assessment or belief she can function in a world that does not make accommodations for disability. Furthermore, whatever school she attends is required by IDEA to make accommodations for her disability by providing appropriate services. There is no evidence that Katie wished to discontinue the services of an interpreter, speech therapist, or audiologist, and no evidence that, if she held such a desire, the services should be discontinued. The last phrase in the above-quoted assertion is correct; i.e., Katie testified in the administrative hearing that she wishes to attend school with her neighborhood friends. The evidence also shows that, of the approximately 400 students in Katie's grade level Flour Bluff Elementary School, 31 lived on the same island as Katie and three resided near her home. (R. Ex. 11, p. 134 (p. 317-318))

2. Assertions: "The best way for Katie to function in that world [that does not make accommodations for her disability] would be to attend the school she would attend were she not disabled." (Pet. at 5-6)

"The District Court was correct in finding that Placement of Katie in her neighborhood school would most closely approximate the world Katie will encounter as an adult (App. 27a)." (Pet. at 13)

Correction: The best way for a deaf child to

function in the adult world is surely correlated with the quality of the child's language and communication skills, but there is no evidence that the skills are developed to a higher degree by the child's attendance at her home school with inferior services compared to a nearby school with superior services.

Furthermore, Respondent disagrees (as did all expert witnesses with experience teaching deaf children) that during Katie's educational program she should be placed in an environment that most closely approximates the adult world; a world in which there will be no IEP or entitlement to the range of services to which Katie is entitled while she is eligible for IDEA services. However, as a legal matter, the provision of services appropriate to Katie's need for assistance in receiving information (interpreter) and need for development of speech and language skills (speech-language pathologist), and need for audiological assessment and equipment management (audiologist) must be geared to her needs in the educational setting as those needs now exist in her formative years and as they may change throughout the course of her education until she enters the adult world.

3. Assertion: "Because of Katie's exceptional skills, this [home school] placement would be appropriate for her." (Pet. at 6)

Correction: Exceptional skill relates to the type and degree of services needed, but does not relate to the school district's discretion in determining the method to deliver the needed services.

4. Assertions: "The ARD Committee did not consider Katie's individual needs when they denied her transfer to her neighborhood school. (App. 26a, 27a). The Respondent's only consideration, in denying Katie's request, was that Katie was a deaf student, and Flour Bluff ISD sends its deaf

students to the regional day school program. (App. 26a)." (Pet. at 6)

Correction: Page 26a of the Appendix includes the district court's recitation of statements that several ARD committee members based their decision not on Katie's abilities, but on the Regional Day School's services [identified on App. page 27a as an interpreter, speech therapist, and audiologist], and a list of six enumerated reasons expressed by ARD Committee members. These reasons are not simply "Katie is deaf."

5. Assertions: "The opinion illustrates the lack of interpretive standards in the Fifth Circuit concerning the rights of disabled students . . ." (Pet. at 7)

"However, the progress made by this Court should not be limited by opinions such as the one at issue when it is obvious that the purposes of the Act are misunderstood." (Pet. at 8)

"*Daniel R.R.* illustrates the statements in the Fifth Circuit's reasoning wherein Justice Gee, joined by Justices Thornberry and Politz, in reference to their inability to grasp the importance of the clear purpose of the Act, and this Court's elucidation of same in *Rowley*, . . ." (Pet. at 8)

"It is submitted that the Fifth Circuit, unlike this Court and Congress, does not consider the IDEA of much importance." (Pet. at 9)

Correction: These statements on pages 7-9 of the Petition are outrageous accusations without any factual foundation and are misinterpretations of Fifth Circuit opinions in the case before the Court and in *Daniel R.R. v. State Bd. of Educ*, 874 F.2d 1036 (5th Cir. 1989). Arguments in response

to Petitioner's assertions are contained within Respondent's Brief.

6. Assertion: "The opinion in the Court below criticizes the District Court for focusing upon the costs of the individual program Katie desired at her neighborhood school in the Flour Bluff ISD. (App. 11a)." (Pet. at 9)

Correction: The Court of Appeals did not criticize the District Court for focusing on financial program costs, but held that the District Court failed to consider, in addition, the educational resource costs of duplicating the programs. (App. to Pet. at 14a-15a) Furthermore, to the extent the phrase "individual program Katie desired at her neighborhood school" conveys the implication that a program different from the program set out in Katie's IEP is at issue, the implication is incorrect. The contents of Katie's IEP (mainstreaming with an interpreter; related services by speech-language pathologists and audiologists) are not at issue; the only issue is the location where the services are to be delivered.

7. Assertions: "The basis of the Court's statement that Katie's individualized, unique needs were of secondary importance . . ." (Pet. at 9)

"Are general convenience considerations of administrators to be given priority over the disabled child with his/her unique, individualized needs?" (Pet. at 10)

"As Petitioner has stated, the opinion below states a preference for administrative convenience over the unique needs of the student." (Pet. at 12)

Correction: The Court of Appeals did not make a statement that Katie's individualized, unique needs were of secondary importance, did not subordinate her needs, and did

not base its decision on administrative convenience. Arguments responding to these erroneous assertions are included in Respondent's brief.

8. Assertion: The Court below must not have considered the proviso in this section [20 U.S.C.A. § 1414(d)] . . . (Pet. at 9) "This proviso was certainly ignored by the Court below." (Pet. at 10)

Correction: The "proviso" in § 1414(d)(3) specifies that states may utilize federal funds to provide direct services through regional and state centers "except that the manner in which such education and services are provided shall be consistent with the requirements of this subchapter." Because the manner in which direct services were provided (i.e., state-supported interpreter, speech-language pathologist, audiologist) was not at issue, there is no basis to imply significance to the "proviso" or assume the Court of Appeals ignored it. Argument regarding the "ignoring the proviso" theory is included in Respondent's brief.

9. Assertions: "Petitioner merely claims (and is supported by assessment data, and also, her teacher) that she does not need these specialized instructional services." (Pet. at 10)

"Katie simply asks to function in a world without accommodations for her disability (those found in the regional day school program), when she doesn't need them. Katie's regular education teacher testified that Katie could be successful in any classroom if she were given an interpreter, preferential seating and a copy of class notes." (Pet. at 13)

Correction: To the extent Petitioner's statement implies she does not need the specialized related services which Regional Day School Program for the Deaf specialists provided

[i.e., interpreter, speech-language pathologist, audiologist], this implication is contrary to undisputed testimony. To the extent Petitioner intended to limit her assertion to a lack of need for instructional services by the RDSPD teacher of the deaf, it is correct that she was fully mainstreamed at Calk Elementary School after an ARD Committee meeting in October 1994. To the extent Petitioner implies that her teacher expressed an opinion about lack of need for related services, this is incorrect. Her teacher acknowledged Katie needed an interpreter, and expressed no opinion at all about Katie's need for speech therapy or audiology services. To the extent Petitioner implies that assessment data shows she needs no services, this is incorrect.

10. Assertions: "It is obvious that the reasoning of the Fifth Circuit cannot be reconciled with this Court's holding in *Rowley*." (Pet. at 10)

"In spite of clear pronouncements by this Court of the construction to be given to the Act, the opinion below strongly illustrates the Fifth Circuit Court's improper interpretation of the Act. This results in many children, like Petitioner, not having their individual needs met in accordance with Congress' mandate." (Pet. at 11)

Correction: These statements are outrageous misstatements without any factual foundation and are misrepresentations of the Fifth Circuit Court's opinion. Further arguments in the response to Petitioner's criticisms of the Court of Appeals are contained within Respondent's brief.

Moreover, this case is not about denial of services or about failure to provide services prescribed in Petitioner's IEP or otherwise about unmet educational needs. Katie's social desire to attend school with friends and the district court's opinion that Katie would benefit by an environment with fewer services (and, necessarily, lower quality services) cannot

constitute an unmet educational need in a practical sense and certainly cannot constitute a unmet educational need in a legal sense as contemplated by the IDEA. The accusation that the Court of Appeals' opinion (which properly confirms the discretion of the school district to choose to provide services to Katie on a nearby campus instead of her home campus) results in "many children . . . not having their individual needs met" is preposterous.

11. "The quality of the education of disabled children is certainly of greater national importance than the validity of rate schedules issued by the Federal Power Commission or the effect of a strike upon national labor policy," citing *United Gas Pipe Line v. Memphis L. G. & W. Div.*, 358 U.S. 152, 79 S.Ct. 184 (1959) and *United Steelworkers of America v. N.L.R.B.*, 376 U.W. 492, 84 S.Ct. 899 (1964). (Pet. at 11-12)

Correction: While it is obvious that the quality of education of disabled children is very important, the quality of education is not at issue in Petitioner's claims. Her claim concerns placement only. The assertion is misleading, however, because it is implies the school district has compromised quality. In fact, it is the school district which has consistently sought to place Katie at a school with RDSPD specialists on staff where Katie's IEP-required services can be delivered to her by higher quality service providers than the school district can provide on its own campus. It is Katie who desires to be placed on a campus where RDSPD interpreters and speech-language pathologists are not available.

Furthermore, the recitations in the *United Gas Pipe Line* and *United Steelworkers* cases about reasons to grant writs merely illustrate the practical application of Supreme Court Rule 10. Where, as in this case, there is no conflict among appellate decisions regarding the general scope of a

school district's discretion in selecting an appropriate location for implementing a child's IEP, the requirements of Rule 10 clearly have not been met, and there is no national importance such that this Court should write on an issue about which the Circuits do not disagree.

12. Assertion: "As a further basis for granting of this petition, Petitioner shows that the opinion below demonstrates a clear conflict between the Fifth Circuit and the Ninth Circuit concerning the emphasis placed by the respective courts of the individualized needs of the disabled student," citing *W.G. v. Bd. of Trustees of Target Range School D.*, 960 F.2d 1479 (9th Cir. 1992) for the proposition that "Central among the safeguards is the process of developing an individualized education program ("IEP") for each child." (Pet. at 12)

Correction: There is no conflict between the Fifth and Ninth Circuits with respect to the emphasis placed on the individualized needs of the disabled student. There is no issue in this case about the process of developing Katie's IEP or whether the services prescribed therein addressed her individual educational needs. There is no conflict between the Fifth Circuit or other circuits regarding the issue on which the Court of Appeals rendered its decision.

13. Assertion: "Thus, the opinion of the Court below has, contrary to this Court's statement in *Rowley* 'substituted their own notions of sound educational policy for those of the school authorities which they review.' *Rowley* at p. 3051 of 102 S.Ct. 3034. The opinion at issue failed to give any weight to the decision of the school authority, the Special Education Hearing Officer of the State of Texas." (Pet. at 13-14)

Correction: The issue of the proper standard and scope of review is addressed in Respondent's brief. The

assertion that the Court of Appeals substituted its notion of sound educational policy for that of school authorities is opposite to the circumstances in this case. This issue is also addressed in Respondent's brief.

14. Assertion: "In summary, because of its lack of rationale, and legal basis, the opinion below cries out for review by this Court. Indeed, the Fifth Circuit, by stating in *Daniel R.R.* that this Court has rendered an 'imprecise ... directive' concerning a pivotal section in this case, 20 U.S.C. Sec. 1401(20), upon which the opinion at issue relies, it should be concluded that the Fifth Circuit petitions this Court for review of this case. It is clear that further guidance is needed from this Court because of the incorrect interpretation of the Act by the Court below. A correct construction of the Act is required by this Court so that the intent of Congress' mandate can be fulfilled. This is a matter of national importance affecting the educational rights of millions of disabled students." (Pet. at 14)

Correction: These statements critical of the Court of Appeals are outrageous misrepresentations. Arguments about such criticisms are included in Respondent's brief. The assertion that the decision of the Court of Appeals creates a matter of national importance affecting the educational rights of other (although probably not millions) of disabled students is true not because the Court erred, but because the Court was correct in joining other circuits is interpreting the law to permit school districts to implement students' individual education plans on campuses with higher quantity and quality of specialists than the school districts can provide on their home campuses. Indeed, students, including Katie, should reap substantial benefits from the Court of Appeals' opinion.